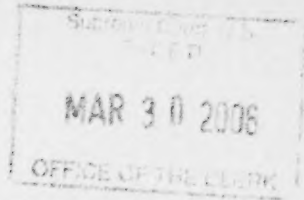


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No. 05-1072



IN THE

Supreme Court of the United States

OTIS DALE TUNE

Petitioner

v.

LISA RUTH GREEN

Respondent

On Petition For Writ Of Certiorari
To The Supreme Court of the State of Oklahoma

PETITIONER'S REPLY BRIEF
SUPPORTING THE
PETITION FOR WRIT OF CERTIORARI

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PARTIES TO PROCEEDING

All parties to this proceeding are listed on the cover page. The attorney for the Petitioner is listed on the cover. The attorney for the Respondent is:

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TABLE OF CONTENTS

Parties to Proceeding	i
Table of Contents	ii
Table of Authorities	iii
Petitioner's Reply Brief Supporting the Petition for Writ of Certiorari	1
APPENDIX	A-1

TABLE OF AUTHORITIES

RULES

Rule 15(6), Rules of the Supreme Court of the United States	
.....	1

**PETITIONER'S REPLY BRIEF SUPPORTING
THE PETITION FOR WRIT OF CERTIORARI**

In accordance with Rule 15(6), Rules of the Supreme Court of the United States, Petitioner respectfully submits his reply brief:

The response brief asserts that Petitioner failed to raise a due-process argument below and argues that this Court should, therefore, decline to grant *certiorari*. This assertion is incorrect. In "Appellant's Amended Petition for *Certiorari*" to the Oklahoma Supreme Court, see attached Appendix, p. A-6, it is expressly urged that the refusal to give the requested circumstantial evidence jury instruction violated Appellant's due-process rights and prevented him from receiving a fair trial. Accordingly, the issue of due process has been presented below.

Petitioner urges this Court to grant *certiorari*.

Respectfully submitted,

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APPENDIX

**IN THE SUPREME COURT OF
THE STATE OF OKLAHOMA**

*Filed in the Supreme Court State of Oklahoma on
Sep 29, 2005, Michael Richie, Clerk*

OTIS DALE TUNE,
Plaintiff,

vs.

LISA RUTH GREEN,
Defendant.

Case No. DJ-2003-737
Judge Michael Gassett

**APPELLANTS' AMENDED
PETITION FOR *CERTIORARI***

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ATTORNEYS FOR PLAINTIFF/APPELLANT

September 28, 2005

AMENDED PETITION FOR *CERTIORARI*

This Petition for *Certiorari* is amended in accordance with the Court's Order of September 27, 2005, to attach the Opinion of the Court of Civil Appeals, which was inadvertently not attached to the original Petition for *Certiorari*.

COMES NOW Plaintiff/Appellant and in support of this Petition for *Certiorari* respectfully submits as follows:

INTRODUCTION

The Court of Civil Appeals, Division II, affirmed the unfavorable verdict of the District Court on July 12, 2005. Thereafter, Appellant filed a Petition for Rehearing and the Petition was denied on August 29, 2005.

CONCISE STATEMENT OF FACTS

The Appellant, the Plaintiff below, brought this civil action as a result of an automobile accident. The Plaintiff had stopped his vehicle in the left-turn lane at an intersection and was waiting for the left-turn arrow to signal that his traffic lane could proceed. The left-turn arrow changed to green and he proceeded through the intersection. No other cars were in the intersection when the Plaintiff turned left and entered the intersection. The Defendant's vehicle then struck him in the middle of the intersection. The Plaintiff contended the Defendant ran the red light. Neither the Plaintiff nor any other witness saw the color of the light when Defendant entered the intersection. The Plaintiff had to rely solely on circumstantial evidence to establish that the Defendant ran the red light. The Plaintiff established by two witnesses that the left-turn arrow control device was controlled by a loop sensor embedded

underneath the left-turn lane. The left-turn lane device is operated by an electronic controller which, of course, also controls all of the traffic control lights at the intersection. Both witnesses confirmed that the left-turn lane control "green arrow" would not be activated until the traffic control device for the oncoming traffic had already turned red. The time sequence is precisely controlled by the electronic controller. Accordingly, by the use of circumstantial evidence, the Plaintiff proved that the Defendant ran the red light.

The Plaintiff requested the Trial Court to instruct the jury on circumstantial evidence, but the Trial Court refused in reliance on OUJI instruction 3.25 which states that, with regard to circumstantial evidence, **"no instruction should be given."** Accordingly, no instruction of any kind was provided to the jury informing them that Oklahoma law recognizes circumstantial evidence and that circumstantial evidence, when proven, is of equal importance as direct evidence because the law does not distinguish between the two types of evidence. Thus, in the absence of any such instruction, the only issue was whether there was any direct evidence that the Defendant ran the red light. This prompted the defense lawyer to argue in his closing argument: ***Apparently, the only person who saw the red light is Bill Wilkinson.*** Predictably, the jury determined there was no direct evidence that Defendant ran the red light and return a verdict unfavorable to the Plaintiff.

The Defendant requested the Trial Court to instruct the jury on comparative negligence by the Plaintiff, and the Court did so. No evidence was introduced to prove any negligence by the Plaintiff. In his closing argument, the Defense counsel argued as follows: ***This accident, you know, as I said before, if they both have a yellow light, you've got to find for the Defendant.*** The argument was improper because there was no

evidence suggesting that the Plaintiff had a yellow light when he began his left turn.

Plaintiff's expert witness, Police Officer Warren, was qualified as a result of education, training, experience, and expertise to give her opinion as to the ultimate issue in this case – the cause of the accident in accordance with 12 O.S. § 2704. In relying on Gabus v. Harvey, 678 P.2d 253 (Okla. 1984), the Trial Court refused to permit such testimony.

ARGUMENTS AND AUTHORITIES

This Court should grant *certiorari* because the Court of Civil Appeals has decided questions of substance in a manner not in accord with accepted legal principles established under the law by statute or by applicable decisions of this Court or the United States Supreme Court. The substantive issues improperly decided by the Court of Civil Appeals will be discussed separately.

CIRCUMSTANTIAL EVIDENCE INSTRUCTION

An important and fundamental legal principle regarding the recognition of both direct and circumstantial evidence has been recognized by this Court and the United States Supreme Court for many years. In the recent decision by the United States Supreme Court in Desert Palace, Inc. v. Catharina F. Costa, 539 U.S. 90, 123 S. Ct. 2148, 156 L.Ed 2d 84, 2003 U.S. LEXIS 4422, the subject of circumstantial evidence is analyzed and discussed. The decision recognizes as fundamental the rule of civil litigation that the Plaintiff may prove his case by using "direct or circumstantial evidence." 539 U.S. 90, 100. The Supreme Court explains:

The reason for treating circumstantial and direct evidence alike is both clear and deep-rooted: "Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence." Rogers v. Missouri Pacific R. Co., 352 U.S. 500, 508, n. 17, 1 L.Ed. 2d 493, 77 S.Ct. 443 (1957). [539 U.S. 90, 100]

This deep-rooted legal principle has also been recognized and adopted by this Court. In Pacific Insurance Company of New York v. Frank, 452 P.2d 794 (Okl. 1969), the Oklahoma Supreme Court reversed the trial court for failing to instruct the jury on circumstantial evidence. In reversing the trial court, this Court held.:

The jury neither was advised, nor had means of knowing, this defense was provable by circumstantial evidence which properly should be considered, or that a preponderance of evidence could be established by circumstantial evidence and the reasonable inferences deducible therefrom.
[452 P.2d 794, 797]

It is clear that our jurisprudence honors this vital legal principle. And it would be difficult to find a case which relies more heavily on circumstantial evidence than this one. The Plaintiff contends the Defendant ran the red light and caused the accident. But there is no direct evidence to support this contention because no witness saw the color of the light when Defendant entered the intersection. The circumstantial evidence, however, is compelling. The traffic control lights at the intersection are all controlled by an electronic device

located at the intersection. Two witnesses called to testify by the Plaintiff explained that a loop sensor device is embedded in the concrete in the left-turn lane where the Plaintiff is stopped waiting to turn. The left-turn arrow does not turn green until the traffic control device for oncoming traffic has already turned red. The time sequence is precisely controlled by the electronic device. The Plaintiff testified he waited to turn until the left-turn arrow turned green and no other cars were then in the intersection. After the Plaintiff turned, the Defendant's car struck him in the intersection. This evidence is the epitome of circumstantial evidence. This circumstantial evidence proves that when the Defendant's car entered the intersection, the traffic light was red.

The Plaintiff requested the Trial Court to instruct the jury on direct and circumstantial evidence, but the Trial Court refused to do so. The Plaintiff/Appellant and the Defendant/Appellee both agree that the only reason for the refusal to instruct the jury on circumstantial evidence was the prohibition found in OUJI Instruction 3.25 regarding direct and circumstantial evidence which indicates, "**NO INSTRUCTION SHOULD BE GIVEN.**" The Plaintiff/Appellant urges it was error to refuse to instruct the jury on this deep-rooted legal principle. To strip this legal protection or legal right for the Plaintiff violated his due-process rights and prevented him from receiving a fair trial. Pierce v. Pierce, 39 P.3d 791 (Okla. 2001). The Court of Civil Appeals relied primarily in its Opinion on the prohibition in OUJI 3.25 without, apparently, ever considering the importance of this important legal principle, or determining whether the legal principle is improperly abrogated by the OUJI prohibition. The Court of Civil Appeals did, however, imply that somehow the legal principle would not apply in any case where there was *any* direct evidence. Unfortunately, no authority is presented for this novel concept. It is difficult to understand how the existence in a trial of some

direct evidence would prevent either party from relying on circumstantial evidence. Thorough research fails to reveal any decision articulating such a principle. Logic undermines such reasoning.

This Court should grant *certiorari* because the decision by the Court of Civil Appeals in this case is not in accord with the deep-rooted legal principle regarding circumstantial evidence and is not in accord with decisions by this Court and by the United States Supreme Court.

COMPARATIVE NEGLIGENCE

The Defendant argued that the Plaintiff was at fault and caused the accident. The Defendant requested a jury instruction for comparative negligence. The Trial Court gave the requested instruction, and the jury found that the Plaintiff was guilty of comparative negligence. The Trial Court erred in giving the instruction, and the jury verdict was improper. In spite of the vigorous arguments by the defense counsel, the trial record reflects that no evidence was ever introduced to prove the Plaintiff was guilty of negligence. Close review of the record reveals there is a complete lack of evidence of any negligence by the Plaintiff. This Court has held that where a lack of evidence exists, it is improper to instruct the jury on comparative negligence. Bullard v. Grisham Const. Co., 660 P.2d 1045 (Okla. 1983).

Certiorari should be granted because the Court of Appeals' decision conflicts with decisions by this Court such as Bullard. The Court of Appeals' decision fails to consider where any factual proof exists to support the comparative negligence instruction. Instead, the Court of Civil Appeals begins and ends its analysis with the unfounded conclusory